

**DECISION**

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**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

**FILE:** B-209703**DATE:** April 22, 1983**MATTER OF:** Lesko Associates, Inc.**DIGEST:**

1. Doubt as to the timeliness of a protest is resolved in favor of the protester.
2. Although procurement was advertised in the Commerce Business Daily--first as unrestricted and later as restricted to small business--an award to a large business concern would not be improper, since the RFP was not restricted and it would be improper to base an award on a preference not stated in the RFP.
3. Contracting agency cannot properly waive definitive criteria of responsibility specifically and purposely placed in a solicitation.

Lesko Associates, Inc. (Lesko), protests the award made to Arthur Young & Company (Arthur Young) by the Department of the Interior (Interior) under request for proposals (RFP) 14-01-0001-F29003.

Interior contends that the protest should not be considered because Lesko knew the basis of protest on October 8, 1982, but did not file the protest until November 2, 1982, which was beyond the 10 working days provided in the Bid Protest Procedures, 4 C.F.R. § 21.2(b)(2) (1983).

On October 8, 1982, Lesko telephoned the contracting officer and questioned the award to Arthur Young because it thought the RFP was restricted to small business and Arthur Young did not comply with that requirement. The contracting officer suggested that Lesko was mistaken as to the status of Arthur Young. Lesko then made an investigation of the status of Arthur Young. The investigation revealed that Arthur Young was not a small business and in addition did

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not meet a specified experience requirement. The record does not indicate when the investigation was completed. However, from the foregoing, it is apparent that October 8 cannot be used to fix the date of the protest for timeliness purposes. Under the circumstances, we will resolve any doubt as to the timeliness of the protest in favor of Lesko. Rolm Intermountain Corporation, B-206327.4, December 22, 1982, 82-2 CPD 564.

Based upon our consideration of the protest, we deny the protest in part and sustain it in part.

The first basis of Lesko's protest is that, since the procurement was advertised twice in the Commerce Business Daily (CBD) and the last advertisement indicated that the procurement was set aside for small business, the award should not have been made to a large business concern. Interior now admits that Arthur Young is a large business concern. However, Interior justifies the award on the basis that the second advertisement, which is the only advertisement indicating a small business restriction, was erroneous.

Although the second advertisement in the CBD indicated that the procurement was restricted to small business, the RFP does not contain any restriction for small business. The purpose of the CBD is to publicize proposed procurements to potential offerors. Federal Procurement Regulations (FPR) subpart 1-1.10 (1964 ed., amend. 153). However, it is the terms of the RFP which govern the basis upon which an award is to be made and it would be improper to base an award on a preference not stated in the RFP. Photonics Technology, Inc., B-200482, April 15, 1981, 81-1 CPD 288.

FPR § 1-1.706-5(e) (1964 ed., amend. 192) prescribes the clause to be used in an RFP when a procurement is a total small business set-aside. The standard clause begins by stating that proposals under the procurement are solicited only from small business concerns. That clause is not in the immediate RFP nor is there any other statement in the RFP indicating that it is restricted to small business concerns. Therefore, we conclude that the RFP was unrestricted and that an award to other than a small business concern would not be improper in the circumstances.

Accordingly, we deny this aspect of the protest.

The second basis of Lesko's protest is that Arthur Young did not meet the qualification requirement in the RFP, which stated that offers would only be accepted from firms engaged in "full time" school planning and related educational planning activities. Interior states that Arthur Young is an accounting firm and admits that Arthur Young does not meet the stated qualification. Interior is not clear whether any other offerors meet the qualification. Interior reports in one place that there were "only three 'purely' educational consulting firms" and in another place it states that "no firm submitting a proposal was engaged full time in school planning and related educational planning activities." Interior indicates that it selected Arthur Young for the contract because of its diversified capabilities in "accounting, management, education, data processing, etc." In effect, Interior waived the qualification requirement, a definitive criterion of responsibility.

We have held that a contracting agency cannot properly waive definitive criteria of responsibility specifically and purposely placed in a solicitation. Haughton Elevator Division, Reliance Electric Company, 55 Comp. Gen. 1051 (1976), 76-1 CPD 294. We indicated in the Haughton decision that the waiver is misleading and prejudicial both to offerors that met the requirement and to any prospective offerors that did not participate in the competition because of the expressed requirement. We indicated further that where a solicitation contains an unnecessary requirement, the criteria must be construed as being unduly restrictive of competition and that, ordinarily, in that circumstance the solicitation should be canceled before award.

Therefore, we conclude that the award to Arthur Young rather than canceling the solicitation was improper. Accordingly, this aspect of the protest is sustained. However, in view of the advanced state of the contract, we do not propose to disturb the award, but we are recommending to the Secretary of the Interior that appropriate action be taken to preclude a recurrence of the deficiencies noted above.

*for Harry R. Van Cleave*  
Comptroller General  
of the United States